STATE OF MICHIGAN

COURT OF APPEALS

SAMUEL KEITH BALL,

Plaintiff-Appellee/Cross-Appellant,

v

JOHN S. DEWEY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
July 9, 2002

No. 223122
Macomb Circuit Court
LC No. 94-005395-NI

Before: Jansen, P.J., and Doctoroff and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a jury verdict awarding plaintiff damages in this automobile negligence action. We remand for retrial on damages and plaintiff's comparative negligence.

I

This case arose from a rollover accident that occurred in the early morning hours of July 4, 1993. Defendant was the driver of the vehicle and plaintiff was a front seat passenger. On the evening of July 3, 1993, defendant and plaintiff, along with some of plaintiff's high school friends, left Macomb County on a trip to Caseville. Although the parties disputed the amount of beer consumed and who purchased the beer, it was undisputed that the group had several cases of beer in the vehicle and that both plaintiff and defendant were drinking. Defendant was eighteen years old and plaintiff was seventeen years old at the time of the accident.

The group stopped in Port Austin around 10 p.m. that evening. While they were in Port Austin the local police discovered the beer in the vehicle, confiscated it, and instructed the group to leave town. Plaintiff alleged that following the incident in Port Austin, defendant began driving at very high speeds. Plaintiff also alleged, and defendant did not dispute, that at various times defendant turned off the vehicle's headlights. While traveling on M-25, defendant lost control of the vehicle, which resulted in the vehicle rolling over. Plaintiff was not wearing his seatbelt and was ejected from and pinned underneath the vehicle. Plaintiff suffered a fractured pelvis and spine and severe burns and scarring on his back from contact with the vehicle's exhaust system.

Plaintiff filed his initial complaint in November 1994, alleging negligence claims against defendant and negligent entrustment claims under the owner's liability statute, MCL 257.401, against Michael Picraux[1] and Chrysler Corporation (Chrysler).[2] The case was submitted to mediation in October 1995, and plaintiff accepted the mediation award and defendant, Chrysler and Picraux all rejected it. In October 1998 plaintiff sought leave to amend its complaint to add claims of "willful or wanton misconduct" and "intentional wrongdoing" against defendant. At a pre-trial hearing in April 1999, the trial court granted plaintiff's motion in limine precluding defendant from arguing that plaintiff was comparatively negligent for failing to object to defendant's negligent driving.

The trial began on May 4, 1999. On the second day of trial, before opening arguments, plaintiff sought to withdraw the allegations that defendant was intoxicated which the trial court granted over defendant's objections. At the conclusion of plaintiff's proofs, plaintiff moved for a directed verdict on defendant's negligence, proximate cause, and liability, on whether plaintiff sustained a serious impairment of a bodily function or permanent serious disfigurement, and on whether plaintiff was comparatively negligent. The court granted plaintiff's motion in part, finding as a matter of law that defendant was negligent and plaintiff sustained a serious permanent disfigurement. However, the trial court denied the motion regarding comparative negligence.

Defendant also moved for a directed verdict on plaintiff's claim for future wage loss. The court denied defendant's motion, finding that plaintiff's expert's testimony that plaintiff may have problems working in the future, although somewhat speculative, supported plaintiff's claim and the issue should go to the jury.

Plaintiff moved for a mistrial arguing that defendant should not have been allowed to introduce evidence that in February 1995 plaintiff operated a vehicle while drinking. Defendant also moved for a mistrial arguing that plaintiff's counsel engaged in deliberate misconduct; however, the court denied the motion. The trial court took both motions under advisement.[3]

On May 11, 1995, the case was submitted to the jury on the issues of damages and plaintiff's comparative negligence. Defendant asked the trial court to instruct the jury with the standard jury instruction SJ2d 12.01, Violation of Statute, arguing that plaintiff was negligent for furnishing alcohol to defendant; however, the trial court denied defendant's request. The special

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[1] Picraux was defendant's stepfather and was leasing the vehicle from Chrysler Corporation through an "Employee/Retiree Car Lease Program." In May 1999, plaintiff voluntarily dismissed Picraux as a defendant.

[2] In December 1995, Chrysler moved for summary disposition, arguing that, as a lessor, it was not subject to liability under the owner's liability statute, MCL 257.401. The trial court denied the motion. Chrysler renewed its motion in July 1996 which the trial court also denied. Chrysler sought leave to appeal which we granted. On appeal, we reversed the trial court's ruling and remanded for entry of an order granting the motion for summary disposition. *Ball v Chrysler Corp*, 225 Mich App 284; 570 NW2d 481 (1997). Chrysler was dismissed as a defendant in September 1997.

[3] The record is unclear whether the trial court ruled on these motions.

verdict form approved by the parties and the court directed the jury to determine plaintiff's future noneconomic damages on an annual basis for the remainder of 1999 through 2047.

The jury returned a verdict finding that plaintiff did not sustain any future wage loss, and that plaintiff's past noneconomic damages amounted to $147,500. The jury also ignored the instructions to determine plaintiff's future noneconomic damages on an annual basis and, instead, awarded plaintiff a lump sum of $352,500 "for the remainder of 1999 through 2047 in 1999 dollars." The jury also found that plaintiff was negligent and his negligence was a proximate cause of his injuries, and determined that plaintiff was 10% comparatively negligent.

On June 3, 1999, the trial court entered a judgment for plaintiff over defendant's objection. The Court also denied plaintiff's motion for additur. At a hearing on plaintiff's motion for mediation sanctions, defendant objected to the reasonableness of the number of hours plaintiff's counsel spent on the case and the hourly rate claimed by plaintiff's counsel. Defendant also objected to plaintiff's request for attorney fees for time plaintiff's counsel spent responding to Chrysler's appeal, arguing that defendant was not involved in that appeal and these fees were not necessitated by defendant's rejection of the mediation evaluation.

In a written opinion and order, the trial court granted plaintiff's motion for mediation sanctions, although it reduced the hourly rates and the amount of hours claimed by plaintiff's counsel. The court also allowed attorney fees connected with the appeal and never specifically addressed defendant's objection.

Defendant moved for a new trial, arguing that the jury's decision to award plaintiff future noneconomic damages in a lump sum in 1999 dollars contravened the trial court's responsibility to reduce future damages awards to present value under MCL 600.6306. Defendant further argued that plaintiff's counsel engaged in misconduct by informing the jury in his closing argument that the trial court would be reducing any award of noneconomic future damages to present value. Finally defendant argued that the trial court failed to reduce the jury verdict to present value as required by MCL 600.6306. In a written opinion and order, the trial court denied defendant's motion, finding no error necessitating a new trial in the jury's verdict because the jury's decision to reduce the award to present value complied with the statute. The trial court also disagreed that plaintiff's remarks regarding the reduction to present value constituted error and, even if the remarks were error, it was harmless. The court also found that it was not required to reduce the award to present value because the jury had already done so.

II

Defendant first claims that the trial court erred by failing to insist that the jury follow the verdict form, in allowing the jury to return a lump sum award already reduced to present value, and in denying defendant's motion for a new trial. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *Kelly v Builder's Square, Inc.*, 465 Mich 29, 34; 632 NW2d 912 (2001). An abuse of discretion occurs where an unprejudiced person, considering the facts on which the trial court acted, would find no justification or excuse for the ruling, or when the result is so palpably and grossly violative of fact and logic that it shows perversity of will, defiance of judgment, or the exercise of passion or bias. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999); *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000).

MCR 2.611(A) allows a trial court to grant a motion for a new trial where a verdict or decision is against the great weight of the evidence or contrary to law. In this case, defendant argues that the trial court erred in denying defendant's motion for a new trial because the jury's verdict was contrary to the law. According to defendant, the jury was obligated by the verdict form and MCL 600.6305(1)(b) to determine plaintiff's future noneconomic damages on a year-by-year basis and to specify those damages plaintiff would suffer in each year. Defendant also claims that the jury's failure to delineate the amount of damages plaintiff would suffer in each year prevented the trial court from fulfilling its duty under MCL 600.6306(1)(c) to reduce those damages to present value. We agree.

MCL 600.6305(1) requires the following:

> (1) Any verdict or judgment rendered by a trier of fact in a personal injury action subject to this chapter *shall include specific findings* of the following:
>
> * * *
>
> (b) Any future damages and the periods over which they will accrue, *on an annual basis*, for each of the following types of future damages:
>
> * * *
>
> (iii) Noneconomic loss. [Emphasis added.]

By its use of the term "shall," the statute clearly requires the finder of fact, the jury in this case, to include in its verdict specific findings regarding plaintiff's future noneconomic loss. In addition, the statute directs that such future damages should be specified on an annual basis. Here, the jury awarded a lump sum for future noneconomic loss with no specific finding of what portion of the total would accrue in which year. Therefore, the verdict in this case is contrary to the unambiguous requirements of MCL 600.6305(1)(b).

Further, the jury arrived at the verdict in contravention of the special verdict form. Under MCR 2.514, a trial court "may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict." In order to comply with MCL 600.6305(1), which requires specific findings regarding damages, the trial court in this case had to utilize a special verdict form. The verdict form that was approved by the parties and the court in advance of submission to the jury appeared to comply with the statutory requirements in that it instructed the jury to specify, on an annual basis, what amount of future noneconomic damages plaintiff would sustain from 1999 to 2047.

There is no existing authority addressing whether a jury may ignore statutory requirements and specific instructions in determining its verdict. We have held that a party who stipulated to a verdict form that did not comply with the tort reform requirements waived appellate review of the issue. *Weiss v Hodge*, 223 Mich App 620, 635-636; 567 NW2d 468 (1997). However, there is no indication that defendant ever stipulated to allowing the jury to ignore that verdict form and, in fact, the record indicates that when the jury inquired whether

they could award a lump sum as opposed to annual awards, defendant specifically objected to a lump sum award. In addition, the trial court did not instruct the jury that it could award a lump sum and instead gave the rather vague response that the jurors should "use [their] collective minds to see what is correct in this matter." Under the circumstances of this case, we conclude that the jury erred when it chose to ignore the instructions of the special verdict form.

Defendant also argues that the verdict in this case is contrary to the requirements of the tort reform act because it prevented the trial court from fulfilling its duty under MCL 600.6306 to reduce plaintiff's future noneconomic damages to present value. The statute at issue governs how the order of judgment should be entered following the jury verdict and states the following:

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959[4], the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> * * *
>
> (e) All future noneconomic damages reduced to gross present cash value. [MCL 600.6306(1)(e).]

"Gross present cash value" is defined as "the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue, as found by the trier of fact as provided in section 6305(1)(b)." MCL 600.6306(2).

Contrary to defendant's argument in this matter, the statute does not require the trial court to reduce plaintiff's future noneconomic damages to present value. Rather, the statute simply states that the order of judgment should include the damages reduced to cash value. In this case, the jury returned a verdict that was in "1999 dollars," implying that the jury had on its own reduced the award to present value. There is no existing authority supporting the proposition that the court must compute present value and the jury is not allowed to make this calculation. In fact, this court has held that where a jury awarded damages in present value, the trial court did not err by refusing to further reduce the damages according to the requirements of MCL 600.6306. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 607; 568 NW2d 93 (1997). Therefore, the jury's decision to reduce the award to present value was not contrary to MCL 600.6306.

In conclusion, we hold that the jury's verdict is contrary to the mandatory provisions of MCL 600.6305 because the jury failed to make specific findings on an annual basis regarding plaintiff's future noneconomic damages. Further, the jury had no authority to ignore the statutory requirements or to disregard the instructions in the special verdict form. The fact that the verdict is contrary to the law constitutes a sufficient ground for granting a new trial under MCR 2.611(A), and the trial court abused its discretion when it denied defendant's motion for a

[4] MCL 600.2959 addresses the reduction of damages based on comparative fault and is not applicable to this issue.

new trial.

Although we agree that a new trial is warranted, the lower court need not conduct a full retrial of this matter and may limit the proceedings to a determination of comparative negligence and plaintiff's damages. Retrials limited to the issue of damages are disfavored, however, an exception exists where liability is clear. *Brewster v Martin Marietta Aluminum Sales, Inc*, 145 Mich App 641, 669; 378 NW2d 558 (1985).

In this case, the trial court granted plaintiff's motion for a directed verdict on the issue of defendant's negligence and whether that negligence proximately caused plaintiff's injuries. Although defendant disputes the court's ruling on this issue, he does not challenge the court's finding that he was negligent. Further, defendant challenged the court's instruction to the jury that his negligence was "the" proximate cause of plaintiff's injuries, however, he does not argue that the court erred in concluding that his actions were "a" proximate cause.

For reasons more fully explained below, we find no error in the trial court's decision to direct a verdict for plaintiff on negligence and causation. It was undisputed that defendant was driving down a winding rural highway at a high rate of speed while consuming alcohol and turning off the vehicle's headlights. Further, it was undisputed that as a result of defendant's conduct, the vehicle left the highway, rolled over, pinned plaintiff under the vehicle, and caused plaintiff to suffer physical injuries. The directed verdict was proper because no reasonable person would disagree that plaintiff's driving was negligent and this negligence resulted in plaintiff's injuries. *Tobin v Providence Hosp*, 244 Mich App 626, 652; 624 NW2d 548 (2001). We further conclude that the trial court correctly determined that plaintiff's comparative negligence raised factual issues and should be submitted to the jury. Because defendant's liability was clear, it would be appropriate to conduct a new trial limited to the issues of plaintiff's comparative negligence and plaintiff's damages. *Brewster*, *supra* at 669.

III

Defendant next argues that the trial court erred when it refused his request to give the jury the standard instruction SJI2d 12.01. A trial court must give a standard jury instruction that is requested by a party, is applicable to the case, and accurately states the law. MCR 2.516. However, the determination whether a jury instruction is accurate and applicable to the case is within the discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

Defendant's proposed modified version of the instruction at issue read as follows:

> We have a state statute which provides that alcoholic liquor shall not be . . . furnished to a person unless the person has attained 21 years of age. . . . A person who knowingly . . . furnishes alcoholic liquor to a person who is less than 21 years of age . . . is guilty of a misdemeanor.
>
> If you find that the plaintiff violated this statute before or at the time of the occurrence, you may infer that the plaintiff was negligent. (You must then decide whether such negligence was a proximate cause of the occurrence.)

The instruction at issue was based on the statute MCL 436.33[5] that prohibited alcohol from being sold or furnished to a person who is not at least 21 years old. Defendant claimed that plaintiff violated this statute by furnishing alcohol to defendant, and, therefore, the instruction was applicable to the case and should have been given to the jury.

Review of the record leads to the conclusion that the trial court did not abuse its discretion in determining that SJI2d 12.01 was not applicable to this case. We disagree with defendant's assertion that plaintiff violated the statute because the evidence did not support a finding that plaintiff "furnished" alcohol to defendant. Only one witness testified that plaintiff might have been directly involved in the purchase of a portion of the alcohol, whereas it was undisputed that defendant independently obtained a significant quantity of beer. Defendant argues that the evidence showed that plaintiff handed beer to defendant while he was driving. Although the statute does not specifically define "furnish," we do not believe that the physical transfer of alcohol from plaintiff to defendant is what the Legislature intended to prohibit.

In addition, this Court has previously held that minors who jointly purchased and obtained alcohol did not engage in conduct that would fall within the meaning of "furnishing" alcohol under MCL 436.33. See *Brown v Jones*, 200 Mich App 212, 216-217; 503 NW2d 735 (1993). Therefore, the trial court properly concluded that SJI2d 12.01 did not apply to this case and need not be given to the jury.

Even if the trial court erred in refusing to give the requested instruction, the error does not require reversal. Reversal is not required due to instructional error unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Here, defendant's purpose in requesting the instruction was to bolster its theory that plaintiff was comparatively negligent. It is apparent from the verdict that the jury found that plaintiff was comparatively negligent based on the evidence presented at trial, which included evidence that plaintiff assisted in obtaining alcohol and encouraged defendant to consume alcohol while he was driving. Defendant failed to demonstrate how the requested instruction would have altered this verdict. Given that defendant obtained the result it sought through the instruction, i.e., a finding that plaintiff was comparatively negligent, reversal is not required to maintain substantial justice.

IV

Defendant also raises several issues regarding the trial court's evidentiary rulings. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998).

A

[5] MCL 436.33 was repealed by PA 1998, 1301. The prohibition of the sale or furnishing of alcohol to minors is now incorporated in MCL 436.1701.

Defendant first claims that the trial court erred when it prohibited defendant from introducing evidence or arguing that plaintiff had a duty to object to or warn defendant of the dangers associated with his operation of the vehicle.

Relevant evidence is generally admissible at trial. *Ellsworth*, *supra* at 188-189. Evidence is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id*. at 188. An erroneous evidentiary ruling does not require reversal unless a substantial right was affected. MRE 103(a); *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

In this case, defendant argues that he should have been allowed to introduce evidence that plaintiff failed to object to defendant's driving or to warn defendant of the danger of his conduct. Although the trial court did not specifically state on what ground it was precluding this evidence, the transcript of the hearing suggests that the court agreed with plaintiff that he had no duty to object or warn, and, therefore, the evidence was irrelevant. We assume for the purpose of this analysis that the court excluded the evidence on the ground of relevancy.

In order to determine whether evidence of plaintiff's failure to object to or warn defendant about the danger of his driving is relevant, it is necessary to determine whether plaintiff had a duty to take action in the face of defendant's negligence. If no such duty exists, it stands to reason that whether plaintiff objected or warned was not a fact that was of consequence to the determination of the action. *Ellsworth*, *supra* at 188. However, if plaintiff had a duty to act, then his alleged inaction would be relevant to defendant's claim that plaintiff was comparatively negligent.

According to the transcript of the motion hearing, the trial court apparently agreed with plaintiff that *Sherman v Korff*, 353 Mich 387; 91 NW2d 485 (1958), established that a passenger had no duty to object or warn, and in fact, should not interfere with the driver's conduct. However, plaintiff's reliance on *Sherman* is misplaced. Our review of this case leads us to conclude that it does not support plaintiff's proposition. Rather, the essential holding of *Sherman* is that the negligence of a driver cannot be imputed to a passenger who is a joint owner of the vehicle. *Id*. at 401-402.

Contrary to plaintiff's assertion that he did not owe a duty to warn or object, there is support for the proposition that a passenger can be comparatively negligent for his actions or inactions. In *Vanderah v Olah*, 387 Mich 643; 199 NW2d 449 (1972), the plaintiff was a passenger in a vehicle driven by her husband when their vehicle was struck by another vehicle driven by the defendant. The defendant sought to prove that the plaintiff was contributorily negligent for voluntarily riding in a car with her husband who was intoxicated, and the Supreme Court found that defendant's theory of contributory negligence was valid. *Id*. at 653-654. The Supreme Court reaffirmed this holding in *Kirby v Larson*, 400 Mich 585, 608-609; 256 NW2d 400 (1977), finding that a passenger may be contributorily negligent because of her own action or inaction. Acknowledging that there may be times where a passenger's actions may create danger rather than avoid it, the court found that whether a passenger's actions or inactions amounted to negligence was a question of fact. *Id*. at 608.

Based on our holdings in *Vanderah*, and *Kirby*, defendant's theory that plaintiff was negligent for voluntarily riding in a car with a driver who was drinking and driving in an obviously hazardous manner does have merit. Evidence of plaintiff's willing participation or active encouragement in defendant's negligent conduct would then be relevant and admissible to support defendant's claim of comparative negligence. Therefore, we conclude that to the extent the trial court excluded evidence of plaintiff's failure to warn or object because it found that plaintiff had no such duty, this ruling would be in error.

Although the court erred by excluding this evidence, the error was harmless. Defendant failed to establish that exclusion of this evidence impeded his right to present the defense of comparative negligence. Indeed, not only was defendant able to present this defense to the jury, but the jury agreed with defendant that plaintiff was comparatively negligent. Because it appears that this error did not affect defendant's substantial rights, *Miller*, *supra*, reversal is not required.

B

Defendant also argues that the trial court should have allowed him to use plaintiff's amended complaint as an admission by plaintiff that defendant was intoxicated. We have held that a party should be allowed "free rein" to compare the pleadings with the testimony presented at trial. *Boggerty v Wilson*, 160 Mich App 514, 527; 408 NW2d 809 (1987); *Vachon v Todorovich*, 356 Mich 182, 187; 97 NW2d 122 (1959). However, commentary on the pleadings, beyond the evidentiary facts cited in the pleadings, is improper. *Boggerty*, *supra*.

Our decision in *Larion v City of Detroit*, 149 Mich App 402; 386 NW2d 199 (1986) is instructive. In *Larion*, the plaintiff's decedent died of injuries sustained while riding as a passenger in an automobile that struck a railroad overpass. Plaintiff sued the defendant City of Detroit for failing to warn of the danger presented by the overpass. Plaintiff also alleged, in connection with various dramshop actions, that the vehicle driver was visibly intoxicated. The defendant city sought, unsuccessfully, to use plaintiff's allegations of the driver's visible intoxication as admissions at trial to show that plaintiff's decedent was contributorily negligent for accepting transportation from the intoxicated driver. On appeal, we noted that the general rule was that averments in a party's final pleading could be used to support an argument for the existence of a fact and that the party is not required to proved the admitted facts. *Id*. at 406. However, the *Larion* Court distinguished between statements of fact in a pleading, and general allegations pleaded to meet the requirements of stating a valid claim, finding that the statements regarding the driver's visible intoxication were merely allegations. *Id*. at 407. We further noted that a defendant has the burden of proving its affirmative defenses, and found that the trial court did not err in preventing defendant from using plaintiff's averments to prove its affirmative defense of contributory negligence. *Id*. at 407-408.

Likewise, in this case, it appears that the statements in plaintiff's complaint regarding defendant's intoxication were merely allegations designed to state a claim of negligence against defendant. Although plaintiff's counsel suggested in its arguments that defendant was not intoxicated, at no time did plaintiff or any other witness deny that defendant was drinking. Defendant sought to use the statements, not to impeach plaintiff's testimony at trial or to rebut plaintiff's case in chief, but to prove his affirmative defense of comparative negligence. Therefore, it appears that the trial court did not abuse its discretion when it concluded that defendant could not use plaintiff's complaint as an admission that defendant was intoxicated.

Even if the trial court's decision to preclude defendant from using plaintiff's complaint was in error, the error would be harmless in this case because defendant was allowed to introduce evidence of defendant's intoxication through the testimony of the investigating officer. Therefore, the trial court's decision on this matter did not rise to the level of reversible error.

C

Defendant also raises claims of error regarding the testimony of the police officers who investigated the accident. Defendant first argues that the trial court erred by allowing plaintiff to admit the "expert" testimony of a police officer who stated that plaintiff was better off not wearing his seatbelt. Plaintiff counters that this testimony was never actually admitted due to defendant's objections, and even if the testimony had been admitted, it was not expert testimony, but a lay opinion. After a review of the record, we conclude that plaintiff is correct that his counsel never obtained the officer's opinion on whether plaintiff was better off with or without a seatbelt and withdrew the line of questioning in response to defendant's repeated objections. Defendant further argues that plaintiff's counsel improperly used this testimony in his closing argument. However, the fact that counsel referenced the alleged testimony in his closing argument was not reversible error where the jury was properly instructed that the arguments of the attorneys are not evidence. *Tobin*, *supra* at 641.

Next, defendant claims that the trial court erred by allowing plaintiff's counsel to obtain expert testimony from a police officer and other witnesses that defendant's conduct was reckless. Review of the record shows that two witnesses, the investigating officer and a passenger in the vehicle, were asked whether they thought it was reckless of defendant to turn off the headlights. In the case of the passenger, the testimony was as follows:

Q. Do you think it was very wreakless [sic] of him to turn off the lights?

A. Yes.

[Defendant's counsel]: There's no foundation for that.

[Plaintiff's counsel]: Same foundation for intentional.

The Court: The Court is going to allow it. Objection overruled.

Q. Was it very wreakless [sic] of him the way he was driving?

A. Yes, yes.

The testimony elicited from the investigating officer was as follows:

Q. What about turning off your headlights July 4th, a few minutes into July 4th on this road, midnight July 4th, what about that?

The Court: What's the question?

Q. What is that, how would you describe that as driving as a cause of the accident?

A. Definitely is not using your head.

Q. How about wreak — wreakless [sic]?

[Defense counsel]: Objection, Your Honor, leading.

Q. Well, let's use —

The Court: Don't lead the witness. If he wants to say that, he can say it. Objection sustained.

Q. Let's go from using the categories from most careful to most wreakless [sic], okay. How would you describe turning off your headlights at midnight on this road, going over the speed limit?

A. Most wreakless [sic].

We agree with plaintiff's contention that these opinions were not impermissible expert testimony, but lay opinions that were rationally based on the witnesses' perception. MRE 701. It is apparent that plaintiff did not elicit expert testimony from either of these witnesses, and, to the extent that defendant argues that the testimony was impermissible expert testimony, defendant's argument is without merit. Further, regarding the officer's testimony, the only objection that defendant raised was that plaintiff's counsel's questioning of the officer was leading. Therefore, defendant failed to preserve any alleged error regarding the lack of foundation or prejudicial nature of the officer's opinion. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 637 ; 601 NW2d 160 (1999).

V

Defendant argues that the trial court abused its discretion by failing to give a special instruction based on principles of assumption of the risk and wrongful conduct. Review of this issue is impeded by the fact that the text of the rejected instruction does not appear in the lower court record, and defendant did not provide a copy of the instruction with his brief on appeal. Defendant claims the instruction was based on the law as stated in *Higgins v Pfeiffer*, 215 Mich App 423; 546 NW2d 645 (1996), *Ritchie-Gamester v City of Berkeley*, 461 Mich 73; 597 NW2d 517 (1999), and *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995).

However, we find no error in the trial court's refusal to give the instruction because the holdings of these cases are not applicable to the instant case. The *Higgins* and *Ritchie-Gamester* cases are not analogous to this case because they address the liability of co-participants in recreational or sporting activities. In *Ritchie-Gamester*, *supra*, our Supreme Court adopted a "reckless misconduct" standard, holding that voluntary participants in recreational activities may not sue for injuries sustained as a result of ordinary negligence. *Id*. at 89. However, it is clear from the language of the opinion that this standard applies only to recreational or sporting

activities. *Id*. Defendant failed to demonstrate why this standard should be expanded to include automobile negligence cases.

The *Orzel* case is also inapplicable in that it addresses the "wrongful-conduct rule," which applies in circumstances where a plaintiff alleges injury resulting from illegal conduct in which plaintiff participated. In *Orzel*, *supra*, the Supreme Court found that the plaintiff, a methamphetamine addict, was barred from bringing an action against a pharmacy that filled his prescriptions where the injury sustained was a direct result of the plaintiff's illegal procurement and possession of a controlled substance. *Id*. at 562-564. However, as we note in *Orzel*, the wrongful-conduct rule is applicable where the plaintiff engages in serious misconduct that is prohibited by a penal or criminal statute, and does not apply to mere violation of safety statutes, such as driving while under the influence of alcohol. *Id*. at 561. See *Longstreth v Gensel*, 423 Mich 675; 375 NW2d 804 (1985).

Here, the only possible illegal conduct that could bar plaintiff's claim would be defendant's allegation that plaintiff furnished alcoholic beverages to defendant, a minor. As stated above, the facts of this case do not support a conclusion that plaintiff violated the statute prohibiting furnishing alcohol to minors. Even if this Court were to find that plaintiff's conduct constituted a violation of the statute, under the holding of *Orzel*, *supra*, the violation did not rise to the level of serious, criminal misconduct such that the wrongful-conduct rule would bar recovery. Therefore, the trial court did not abuse its discretion in denying defendant's request for a special instruction that was inapplicable to this case.

VI

Defendant next argues that the trial court erred by directing a verdict for plaintiff on two issues regarding defendant's liability. We review de novo a trial court's decision to grant a directed verdict. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

Defendant first argues that the trial court erred when it concluded that plaintiff suffered a permanent serious disfigurement and, therefore, met the threshold requirement under MCL 500.3135(1) for recovering noneconomic tort damages. Defendant does not dispute that plaintiff sustained a permanent serious disfigurement. Rather, defendant argues that the court erred in concluding that a permanent serious disfigurement alone was sufficient to meet the statutory threshold. MCL 500.3135(1) states that

> [a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, *or* permanent serious disfigurement. [emphasis added]

It is apparent from the statute that the threshold is met when a plaintiff establishes one of three conditions: (1) death, (2) serious impairment of a body function, or (3) permanent serious disfigurement. The use of the word "or" clearly indicates that only one of the conditions need be satisfied to recover noneconomic damages. Therefore, defendant's argument is without merit.

Defendant also argues that the trial court erred when it instructed the jury that defendant's negligence was "the" proximate cause of plaintiff's damages. It appears that defendant does not contest the court's finding that defendant was negligent or that this negligence was "a" proximate cause of plaintiff's injuries. The transcript reveals that the trial court told the jury the following:

> But before we ask for the first closing argument by Mr. Miller, as a matter of law I'm going to tell you something that as a matter of law that you are to take into consideration. Defendant Dewey was negligent and Defendant Dewey's negligence was the proximate cause of the burn injury sustained by Plaintiff Ball which was a permanent, serious disfigurement.

Our Supreme Court has held that where there is an issue of fact regarding the negligence of more than one party, it is error for a court to instruct the jury regarding "the" proximate cause as opposed to "a" proximate cause. *Kirby*, *supra* at 605-606. Because there was an issue regarding plaintiff's comparative negligence, defendant is correct that the trial court erred by instructing the jury that defendant's negligence was the proximate cause of plaintiff's injuries.

Nevertheless, reversal in not required for instructional error unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case*, *supra* at 6. In this case, despite the trial court's inappropriate use of "the" proximate cause, the verdict form indicates that the jury was able to conclude that plaintiff's negligence was also a proximate cause of plaintiff's injuries. Because the court's language did not result in jury confusion, the error was harmless and no substantial injustice occurred.

VII

Defendant next claims that the trial court erred in denying his motion for directed verdict on future economic damages. A directed verdict is appropriate when no factual question exists upon which reasonable minds could differ. *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 524; 529 NW2d 318 (1995). The record in this case supports defendant's argument that plaintiff's only evidence of future wage loss was the testimony of a doctor who believed that plaintiff might have to change occupations in the future due to traumatic arthritis. It was undisputed that at the time of the trial plaintiff was fully capable of working and supporting himself. This speculative evidence was insufficient to create a factual issue, and reasonable minds could not have differed that plaintiff was not entitled to recover future economic damages. *Alar*, *supra* at 524. Therefore, the trial court erred when it concluded that defendant's motion for directed verdict should be denied.

Although the trial court erred, we decline to address this error because it is moot. An issue is moot when an event occurs which renders it impossible for the reviewing court to fashion a remedy to the controversy. *Michigan Nat'l Bank v St Paul Fire & Marine Ins*, 223 Mich App 19, 21; 566 NW2d 7 (1997). In this case, the jury's conclusion that plaintiff was not entitled to future economic damages rendered this issue moot.

VIII

Defendant next claims that the trial court abused its discretion when it refused to grant defendant's motion for a mistrial because plaintiff's counsel engaged in misconduct that was so prejudicial that a new trial was warranted. Whether to grant or deny a mistrial in a civil action is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999). Further, claims of misconduct of counsel are generally reviewed initially to determine whether the claimed error was in fact error, was harmless, and was properly preserved by objection or a motion for mistrial. *Badalamenti v William Beaumont Hosp - Troy*, 237 Mich App 278, 290; 602 NW2d 854 (1999). Comments of counsel will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair trial or a studied purpose to prejudice the jury or deflect the jury's attention from the issues. *Kubisz*, *supra* at 638. A new trial may be granted if "the court cannot say that the result was not affected." *Badalamenti*, *supra* at 290.

In this case, defendant cites several examples of alleged misconduct on the part of plaintiff's counsel, including: (1) accusing the defense in both opening and closing arguments of blaming the victim and failing to take responsibility for plaintiff's damages; (2) eliciting opinion testimony on defendant's "recklessness;" (3) comparing defense counsel to a squid; (4) accusing defense counsel of trickery; (5) introducing a veiled reference to a mass murder at a high school in Columbine, Colorado, and (6) informing the jury of the trial court's obligation pursuant to MCL 600.6306 to reduce future noneconomic damages to present value and accusing the defense of trying to keep this information from the jury. Defendant further argues that the cumulative affect of these alleged errors was so prejudicial that a new trial is required.

We first note that two of the incidents of misconduct alleged by defendant were not in fact error. Contrary to defendant's claim, plaintiff's counsel's attempt to elicit lay opinions on defendant's recklessness was not error. In addition, defendant failed to demonstrate how the trial court's decision to allow plaintiff's counsel to inform the jury of the reduction of future damages to present value embodied in MCL 600.6306 was error. Nothing within the plain language of the statute prohibits a party or the court from telling the jury about this provision. By contrast, other provisions of the tort reform act specifically prohibit the trial court or counsel from informing the jury of the statute's requirements. See MCL 600.6304(5). Defendant did not cite any authority supporting his position that it is error to permit the jury to know about the present value reduction, and, in the absence of such authority, we find no error.

Regarding the remaining allegations of misconduct, we conclude that the incidences at issue are troubling and reflect poorly on plaintiff's counsel, but they do to rise to the level of misconduct warranting a new trial. The record shows that in each of these circumstances, defendant objected to the misconduct and, the trial court generally sustained the objection and occasionally instructed the jury to disregard the statements. We have held that a trial court's decision to grant a mistrial was appropriate only where a curative instruction would not suffice to cure the prejudice. *Persichini*, *supra* at 636-637. Further, the trial court properly instructed the jury at the beginning of the trial that the arguments of counsel are not evidence. Jurors are presumed to understand and follow their instructions, *Bordeaux v The Celotex Corp*, 203 Mich App 158, 164 ; 511 NW2d 899 (1993), and defendant failed to produce any evidence to overcome this presumption.

Because the alleged misconduct of plaintiff's counsel was either not error in fact, or did not constitute a deliberate course of conduct aimed at preventing a fair trial, prejudicing the jury, or deflecting the jury's attention from the issues, the trial court did not abuse its discretion in denying defendant's motion for mistrial.

IX

In his final assertion of error, defendant argues that the trial court abused its discretion when it awarded plaintiff mediation sanctions that included attorney fees incurred during plaintiff's unsuccessful opposition to a co-defendant's appeal. However, we need not reach this issue because our decision to remand for a new trial on plaintiff's comparative negligence and damages makes this issue moot. In remanding for a new trial, we vacate the damages portions of the existing verdict and judgment, and the award of mediation sanctions would necessarily be vacated as well. The remand for a new trial renders it impossible for this Court to fashion a remedy. *Michigan Nat'l Bank, supra* at 21.

X

On cross-appeal, plaintiff argues that the trial court erred in denying its motion for additur. According to plaintiff, the jury's decision to reduce his future noneconomic damages to present value resulted in a grossly inadequate verdict because the jury used "economic" present value instead of the "legal" present value dictated by MCL 600.6306. A trial court's inquiry on the issue of additur is limited to objective considerations regarding the evidence and the conduct of the trial. *Setterington, supra* at 608. The proper consideration when reviewing a trial court's decision to deny additur is whether the evidence supports the jury's award. *Id*.

Here, plaintiff failed to demonstrate that the objective evidence presented at the trial did not support the jury's award. Plaintiff's sole argument on this issue is his claim that the jury applied the wrong calculation in determining present value. This assertion is purely speculative and there is no way of determining how the jury arrived at its calculation. Further, it is apparent from the record that plaintiff's counsel informed the jury that the present value of future damages would be calculated by a 5% annual reduction. Because there is no objective evidence that the jury calculated the reduction to present value in any fashion other than by reducing plaintiff's damages by 5% per year, the trial court did not err in denying plaintiff's motion for additur.

Remanded for retrial on damages and plaintiff's comparative negligence. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Donald S. Owens